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No. 10-666

JUN 21 2011

IN THE

Supreme Court of the United States

GLENN L. DIER ET AL.,
Petitioners,

v.

MERCK SHARP & DOHME CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

After years of personal-injury litigation concerning the prescription drug Vioxx, attorneys representing plaintiffs and the defendant, Merck Sharp & Dohme Corp., agreed to establish a private claims-resolution program for plaintiffs alleging that Vioxx caused them to sustain a heart attack, an ischemic stroke or sudden cardiac death. Participation in the program was voluntary, and the program resulted in the resolution of tens of thousands of claims. In order to streamline resolution of unsettled claims, the district court entered pretrial orders requiring non-settling plaintiffs to submit a case-specific expert report linking their alleged injury to Vioxx. The orders stated that plaintiffs who failed to comply with their terms would face dismissal of their claims. Petitioners refused to comply with the orders. After extending the time to comply with the orders by more than a year, and entertaining multiple motions by the petitioners to set aside the settlement and to modify or vacate the orders, the district court dismissed their claims. The court of appeals affirmed.

The questions presented are the following:

1. Did the court of appeals correctly find that petitioners, who did not settle their claims and were free to pursue them in court, lacked standing to challenge a private, opt-in settlement agreement?

2. Did the court of appeals properly hold that the district court acted within its broad authority to manage multidistrict litigation in entering a pair of orders requiring non-settling Vioxx plaintiffs to submit an expert report linking their alleged injuries to Vioxx?

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JURISDICTION

Jurisdiction is lacking with respect to the first question presented. Although petitioners cite 28 U.S.C. § 1254(1), they fail to present a "Case" or "Controversy" as required for the invocation of federal jurisdiction under Article III of the U.S. Constitution because they lack standing to challenge the private, opt-in settlement agreement to which they were not parties.

STATEMENT OF THE CASE

Petitioners ask the Court to set aside a private, opt-in settlement agreement to which they are not parties. According to petitioners, the private agreement, in combination with a set of modest discovery orders entered by the district court below, operated as a de facto class-action settlement. But no one other than petitioners has ever accepted that theory, and there is no division of authority on the question. Thus, even accepting petitioners' contention that the issue presented is one of "exceptional public importance," there is no serious public disagreement about its resolution, leaving no need for this Court's intervention.

Moreover, even if petitioners' theory had merit, the court of appeals' ruling, affirming dismissal of petitioners' claims, would still have been proper. *Every* court to consider the question has held that non-settling parties – even parties who opt out of class settlements – lack standing to challenge a private agreement between other parties. The court of appeals properly applied this unanimous precedent to dispose of petitioners' challenge.

The court of appeals also properly rejected petitioners' argument that the district court abused its discretion in dismissing their claims for failure to comply with simple discovery orders requiring petitioners and other non-settling parties to produce expert reports linking their ingestion of Vioxx to their alleged injuries. Courts and commentators alike have acknowledged that such discovery orders are crucial tools for managing multidistrict mass tort litigation, particularly in its mature stages, and are well within a district court's broad discretion to enter.[1]

The Underlying MDL Proceeding. This case grew out of the settlement of certain claims in the litigation over the prescription drug Vioxx, a non-steroidal anti-inflammatory drug approved by the Food and Drug Administration in 1999 for the treatment of osteoarthritis pain. Litigation over Vioxx has spanned almost a decade. Beginning as early as 2001, plaintiffs in various jurisdictions filed cases asserting that Vioxx poses an increased risk of cardiovascular injuries. Vioxx was withdrawn from the market in September 2004, and MDL proceedings were established in the U.S. District Court for the Eastern District of Louisiana in 2005, ultimately comprising thousands of individually filed claims. Judge Eldon Fallon has overseen these proceedings since their inception. *See generally Plunkett v. Merck & Co.*, 401 F. Supp. 2d 565, 570-72 (E.D. La. 2005);

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[1] Petitioners' attack on the discovery orders is, in any event, a red herring: their calculated defiance of the discovery orders was merely an instrument to secure an appellate forum for their attack on a settlement that has nothing to do with them.

In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

To manage the sprawling proceeding, the district court appointed attorneys to serve on the Plaintiffs' Steering Committee ("PSC") and Defendant's Steering Committee. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608 n.3 (E.D. La. 2008). The court held monthly status conferences with the committees to review the progress of the litigation. *Id.* at 608. However, the court did not require individual plaintiffs to rely on the PSC to represent their interests at these conferences; the conferences were open to anyone who wished to attend. *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008).

The district court quickly directed the parties to address whether it could certify a class of personal injury plaintiffs. In November 2006, after the parties briefed the issue, the court entered an order denying certification of a nationwide class. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006). The court found that the choice-of-law analysis would "present[] significant hurdles to certification of a nationwide class . . . because the application of the laws of fifty-one jurisdictions . . . creates problems for typicality, adequacy, predominance, and superiority . . . ." *Id.* The court also noted that the personal injury claims raised numerous individualized questions of fact that would prevent the putative class from satisfying Rule 23(a) and (b)(3). *Id.* at 460-63.

After the district court denied class certification, the parties continued with bellwether trials – "test cases" intended to assist the parties in moving toward resolution of the litigation. *In re Vioxx*, 574 F. Supp. 2d at 608-09. The majority of these trials re-

sulted in defense verdicts. *Id.* During the same time period, there were thirteen trials in state courts around the country, and the majority of those trials resulted in defense verdicts too. *Id.* at 609. (*See also* Pet. 29 n.12.)

Master Settlement Agreement. On November 9, 2007, following several years of litigation, discovery of millions of documents and depositions of numerous witnesses and experts, counsel for Merck and the Negotiating Plaintiffs' Counsel ("NPC") announced a private agreement to settle many Vioxx personal injury cases pending in the MDL proceeding and other jurisdictions around the country. (*See* Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) ("MSA"), *available at* http://www.browngreer.com/vioxxsettlement.)

The MSA established a $4.85 billion fund to resolve cases pending on November 9, 2007, in which the plaintiffs claimed that Vioxx caused a heart attack, ischemic stroke or sudden cardiac death. MSA, Recitals. The parties requested that Judge Fallon carry out certain administrative responsibilities under the Agreement in connection with the settlement. (*Id.* § 6.1.1.)

Claimants could enroll in the MSA if they met certain criteria that the MSA identified as "gates." (*See* MSA § 2.2.1.) Claimants passed the "injury" gate if they asserted one of three injuries – heart attack, ischemic stroke or sudden cardiac death – as defined by the MSA. (*See id.* Ex. 2.2.1.1.) Claimants passed the "proximity" gate if they produced evidence that they had ingested Vioxx within 14 days of their alleged injury. (*See id.* Ex. 2.2.1.3.)

Unlike a class settlement, the MSA bound only those claimants who affirmatively consented to its terms and opted into the resolution program it created. Plaintiffs' counsel were to decide whether they could ethically recommend settlement to all of their clients. (*Id.* § 1.2.8.1.)[2] Many did so, but the decision whether to enroll was left exclusively with the individual plaintiffs.

Petitioners were not eligible to participate in the MSA because the injuries they allege were not covered by the agreement (and because some of them filed their cases after November 9, 2007, the last filing date on which claims were eligible for resolution).[3]

The MSA's resolution program is essentially complete. At this time, all claims submitted for

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[2] Counsel were also free to recommend the settlement to some or none of their clients, but they could not automatically enroll their clients in the resolution program under those circumstances. The MSA permitted Merck to waive objection to partial enrollment in these situations or to raise an objection to be resolved by Judge Fallon. (MSA §§ 1.2.8, 1.2.9.) Plaintiffs' counsel who recommended settlement to all clients were permitted to enroll only those clients who wished to participate in the program, provided that counsel attempted to withdraw from representation of clients who did not wish to participate. (*Id.* § 1.2.8.2.) These provisions of the MSA were carefully applied to ensure that each litigant had representation and that each attorney could comply with his or her ethical obligations.

[3] Petitioners do not identify their alleged injuries in their petition, but the alleged injuries include heart palpitations, loss of consciousness and chest pain.

resolution have been resolved and nearly all payments have been made.

The District Court's Discovery Orders. Despite the success of the MSA, it did not resolve (and was not intended to resolve) all outstanding Vioxx personal injury claims. Recognizing as much, on the day the MSA was announced, the district court entered several new pretrial orders ("PTOs") to prepare the remaining cases for the next phase of litigation.

Two of these orders – PTOs 28 and 29 – impose limited document-preservation and discovery obligations on plaintiffs with pending claims. The orders imposed substantially identical requirements, but PTO 28 covered claims that were pending on the date of the settlement, while PTO 29 covered claims that were filed thereafter. In relevant part, PTOs 28 and 29 both required plaintiffs to submit a Rule 26(a)(2) case-specific expert report from a medical expert attesting that the plaintiff sustained an injury and that Vioxx caused the injury. (PTO 28 § II, A-9-A-10; PTO 29 § II, A-26.) Such orders are common in mass-tort litigation and are sometimes called "*Lone Pine*" orders, named for the first case to employ such case-management techniques.[4]

The document productions required by PTOs 28 and 29 were to be made within specific time periods. For cases pending on the date of the settlement,

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[4] *See Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); *see also* David F. Herr, *Ann. Manual for Complex Litigation* § 11.3 (4th ed. 2010) (explaining that *Lone Pine* orders "have been widely used in mass torts to isolate spurious claims") (collecting illustrative cases).

plaintiffs whose last names began with A through L ("A-L plaintiffs") were to produce all required documents by May 1, 2008; plaintiffs whose last names began with M through Z ("M-Z plaintiffs") were to produce the documents by July 1, 2008. (PTO 28 § II.C, A-10-A-11.) Plaintiffs filing after the settlement date were given 45 days to produce required documents. (PTO 29 § II.A, A-23.) In the event plaintiffs failed to comply with the requirements of either PTO 28 or 29, they were entitled to 30 extra days to cure any deficiency, after which time Merck was permitted to move for an order to show cause why the noncomplying cases should not be dismissed with prejudice. (PTO 28 §§ I.D, II.D, A-5, A-12; PTO 29 §§ I.E, II.C, A-22, A-27.)

To make clear that PTO 28 applied only to nonsettling cases that were pending prior to November 9, 2007, the order expressly provided that it did not apply if "(a) the injury alleged is a Myocardial Infarction ('MI'), Sudden Cardiac Death ('SCD'), or Stroke as those terms are defined, infra., in Section III, *and* (b) the Plaintiff or Claimant has submitted the claim to the Resolution Program." (PTO 28 § II.A, A-6.) Section III of PTO 28 defined those injuries – necessarily tracking the definitions employed in the MSA itself – to ensure that PTO 28 reached nonsettling plaintiffs only, as no further discovery or preservation was required for plaintiffs who had decided to resolve their claims by settlement. (PTO 28 § III, A-13-A-18.) No similar definition section was included in PTO 29 – and none was needed – because no claim filed after November 9, 2007, was eligible for resolution under the MSA. (MSA, Recitals, ¶ H.)

The district court also entered two other orders to facilitate management of the litigation while the MSA registration and resolution process was pending. The first, PTO 30, imposed a stay of discovery to allow plaintiffs to consider whether to enroll in the MSA's resolution program, with an exception for the discovery requirements set forth in PTOs 28 and 29. (Pet. App. A, at 4a; PTO 30, A-35-A-37.) The second, PTO 31, required plaintiffs' counsel to register all claims in which they had an interest with the district court and indicate whether they planned to recommend enrollment in the resolution program.[5]

Challenges to the MSA and PTOs 28-31. Because petitioners alleged injuries that were not covered under the MSA's terms, they could not settle their claims. Rather, they set out to challenge the MSA and the requirements set forth in the district court's new PTOs. In December 2007, less than a month after the MSA was announced, a group of plaintiffs represented by petitioners' counsel ("*Agard* plaintiffs")[6] appealed to the Fifth Circuit – ostensibly from the MSA and PTO 28. Because neither the MSA nor PTO 28 was a final judgment, and because no other basis existed for appeal, Merck moved to dis-

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[5] Petitioners mischaracterize PTO 31 as "requiring all plaintiffs' counsel of record . . . to recommend to each client that they enroll in the MSA." (Pet. 14.) PTO 31 required no such thing. It merely required counsel to indicate whether they intended to make such a recommendation, or whether they instead recommended against settlement. (PTO 31 Ex. A, A-43-A-45.)

[6] Among the *Agard* plaintiffs was Robert D. Gates, who is a petitioner in the instant matter.

miss the appeal. The Fifth Circuit granted Merck's motion without an opinion. (*See* Pet. App. C, at 19a.)

Shortly after the Fifth Circuit dismissed the *Agard* plaintiffs' appeal, another group of plaintiffs represented by the Oldfather Law Firm ("Oldfather plaintiffs") moved the district court to modify or suspend PTO 28. The district court rejected their arguments that the PTO was premature and unfairly burdensome. *See In re Vioxx*, 557 F. Supp. 2d at 743 (explaining that *Lone Pine* orders like PTO 28 are a recognized and appropriate means "to identify and cull potentially merit less claims and streamline litigation") (internal quotation marks and citation omitted). According to the court, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *Id.* at 744. After all, "if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief." *Id.* Nonetheless, the court extended the PTO 28 deadlines "to ensure that all Plaintiffs ha[d] a fair opportunity to comply with [the limited discovery] provision of PTO 28." *Id.* at 745. The court extended the deadline for A-L plaintiffs to July 1, 2008 and the deadline for M-Z plaintiffs to August 1, 2008. *Id.*[7]

On the day before the first of these extended deadlines, the *Agard* plaintiffs filed a motion making substantially the same arguments as those made by

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[7] Thus, while petitioners contend that the Oldfather challenge was "rejected by the district court" (Pet. 16), the reality is that the primary relief those plaintiffs sought – an extension of time limits to comply with PTO 28 – was in fact granted.

the Oldfather plaintiffs. In addition, the *Agard* plaintiffs argued that the district court's role as settlement administrator and coordinator of the MDL proceeding created an incurable conflict of interest, requiring Judge Fallon to resign as settlement administrator. Further, they sought to eliminate the case-specific-expert-report requirement and argued that the MSA should be vacated or declared void under Rule 23. Finally, they sought an extension of the PTO 28 deadline to September 30, 2008 for A-L plaintiffs and October 31, 2008 for M-Z plaintiffs. (*See* Pet. App. C, at 21a-22a.)

On December 10, 2008, the district court denied the *Agard* plaintiffs' motion in its entirety. The court upheld the requirements of PTO 28, relying on its reasoning in the Oldfather ruling that PTO 28 is a standard *Lone Pine* order designed to streamline mass litigation. (A-55-A-58.) The court described the *Agard* plaintiffs' complaint regarding the ostensible burdensomeness of PTO 28 as "simply not credible." (A-57.) In addition, the court ruled that Judge Fallon need not resign as administrator of the settlement. According to the district court, "[t]he facts of the instant case do not warrant recusal" because "the [c]ourt serves in an administrative capacity" in connection with the settlement "that has no substantive effect on its management of the MDL proceedings." (A-53.) In his ruling, Judge Fallon emphasized that "[t]he Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement." (A-54.) The court

also declined the *Agard* plaintiffs' invitation to void the MSA, explaining that "[u]nlike a class settlement, the MSA is a private, opt-in settlement that was not secured through a settlement class vehicle and [it] therefore poses no risk of binding any unwilling plaintiff to its terms." (A-55.)

Dismissal of Petitioners' Claims. On November 26, 2008, Merck filed a motion for an order to show cause why petitioners' claims should not be dismissed in light of their failure to comply with PTOs 28 and 29.[8] The district court granted the motion and ordered petitioners to respond by January 9, 2009. (Pet. App. C, at 22a.) Petitioners filed two responses purporting to show why their cases should not be dismissed and two cross motions, again requesting an extension of discovery deadlines and recusal of Judge Fallon. (*See id.* at 22a-23a.) The filings substantially repeated the arguments made by the Oldfather and *Agard* plaintiffs in their respective challenges to PTO 28.

The district court rejected petitioners' arguments, denied their cross motions, and dismissed their cases. In so doing, the district court "adopt[ed] its earlier reasoning and [found] that the plaintiffs' redundant requests for recusal, additional extensions of time, or modification of PTOs 28 and 29 are without merit." (Pet. App. C, at 23a.) In its ruling, the court noted that the deadlines for petitioners' compliance with the PTOs had long passed; yet, "rather than simply

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[8] Merck moved under both PTOs 28 and 29 because some of the petitioners had filed their claims after November 9, 2007 – the date of the MSA – and were thus covered by PTO 29.

comply with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable." (*Id.* at 23a-24a.) The district court also found that, "[a]t this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29." (*Id.* at 24a.) It further noted that petitioners' counsel had been reprimanded by other courts for engaging in similarly obstinate behavior.[9] (*Id.* at 25a & n.3.)

Appellate Proceedings. After the district court dismissed their cases, petitioners sought review in the court of appeals. The Fifth Circuit affirmed the district court's ruling in a *per curiam* opinion. First, the court of appeals held that petitioners lacked standing to challenge the MSA. Even "in the context of class settlements," it explained, "non-settling parties generally have no standing to challenge the settlement." (Pet. App. A, at 7a.) The only "exception to the general rule" applies where an "agreement strips non-settling parties of rights to contribution or indemnity" or "in some other manner" that "results in plain legal prejudice." (*Id.* (internal quotation marks and citation omitted).) "But mere allegations of . . . tactical disadvantage as a result of a settle-

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[9] Petitioners have been represented by two attorneys from the Law Office of Ronald R. Benjamin through the course of these proceedings – Ronald Benjamin and Marya Young. The district court's comments were in reference to Mr. Benjamin. Only Ms. Young represents petitioners before this Court, presumably because Mr. Benjamin has been disbarred from practicing before it. *See In re Disbarment of Benjamin*, 488 U.S. 1000 (1989).

ment simply do not rise to the level of plain legal prejudice." (*Id.* at 8a (alternations, internal quotation marks and citation omitted).) And because the MSA was structured as an "'opt-in' private settlement" to which petitioners were not parties, they could not show they suffered the legal prejudice necessary to establish standing. (*Id.*)

Second, the court of appeals held that the district court had not abused its discretion by entering a *Lone Pine* pretrial order or by dismissing petitioners' cases for failure to comply with that order. The court of appeals explained that the district court had followed established Fifth Circuit precedent, which acknowledged that *Lone Pine* "'orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16.'" (*Id.* at 13a (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000)).)[10]

Petitioners now seek this Court's discretionary review.

REASONS FOR DENYING THE PETITION

1. The Court should deny the petition because this case presents no departure from the Court's precedents and no question over which lower courts are divided.

2. The Court should also deny the petition because the decisions below were correct. First, petitioners lacked standing to challenge the MSA, a

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[10] The court of appeals also affirmed the district court's order denying petitioners' recusal argument, which is not pressed before this Court. (*See* Pet. App. A, at 8a-11a.)

private, opt-in agreement to which they were not parties. Second, the district court acted well within its broad discretion to manage multidistrict proceedings when it entered, and later enforced, two pretrial orders with which petitioners refused to comply.

I. The Decision Below Does Not Present A Question Of "Exceptional National Importance" And Does Not Conflict With The Precedents Of This Or Any Other Court.

The petition should first be denied because petitioners have failed to present any remotely compelling reason for the Court to exercise its discretionary review.

First, petitioners do not point to any conflict between the decision of the court below and those of any other lower court. *See* S. Ct. R. 10(a). To the contrary, petitioners themselves concede that the Fifth Circuit "is the first federal appellate court to review . . . an agreement" such as the MSA.[11] (Pet. 20.) This alone warrants denial of the petition. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (opining that petition for writ of certiorari should be denied where the issue requires further study in the lower courts before it is addressed by this Court).

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[11] Petitioners state that the decision below is the first "to review such an agreement *with approval*" (Pet. 20 (emphasis added)) – as if to suggest that some other courts have reviewed and *disapproved* of private, opt-in settlement agreements like the one at issue in this case. But petitioners do not cite any such cases, and Merck is not aware of any.

Second, petitioners advance no argument that the decisions below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). In fact, petitioners again suggest the contrary, noting that federal courts have pursued similar courses to resolving mass-tort litigation for "the past decade." (Pet. 20.)

Third, the decisions below do not "conflict[] with relevant decisions of this Court." S. Ct. Rule 10(c). Petitioners argue that they do, contending that the decisions below are "[c]ontrary to the letter and spirit" of cases like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard, Corp.*, 527 U.S. 815 (1999). They are wrong.

Amchem and *Ortiz* involved class settlements. The Court held those settlements to be infirm because they purported to bind the interests of certain absent class members who had no way to opt out of the agreements. Settlements in those circumstances raise due process concerns because they are binding by default. *See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (explaining that the "overarching concern" relative to class settlements is "that absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit").

There is no such danger with the MSA. The MSA has never been viewed as a "class settlement"; after all, the district court expressly considered and denied certification earlier in the litigation. *See In re Vioxx*, 239 F.R.D. at 459; *see also Amchem*, 521 U.S. at 619-20 (explaining that class settlements are subject to

the same requirements as non-settlement class actions, with the possible exception of the manageability requirement of Rule 23(b)(3)).[12]

It is just as clear that the MSA was not a "de facto" class-action settlement, as petitioners suggest. (*E.g.*, Pet. 23.) After all, this Court's concerns in *Amchem* and *Ortiz* were animated by the fact that class settlements bind all class members except for those who affirmatively opt out – raising the risk of unwitting involvement. But that risk is not presented here because the MSA was only binding as to individuals who affirmatively opted *in* to the agreement, eliminating any risk of unintentional participation.[13] *See* John Bronsteen, *Class Action Settlements: An Opt-In*

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[12] Nonetheless, Petitioners repeatedly and erroneously refer to themselves as "absent class members," *see, e.g.*, Pet. 22 ("The Fifth Circuit erred in the first instance by classifying petitioners as non-settling parties when in fact they were absent class members."), and characterize the MSA as a class settlement, *see id.* at 19 ("On its face, the Vioxx MSA established a nationwide administrative claims regime similar to the schemes that were before this Court in *Amchem*, and later in *Ortiz*. . . .").

[13] Petitioners suggest otherwise, noting that one-third of the claimants who entered the program "received nothing" and asserting that these claimants were thereby "excluded from any compensation." (*Id.* 28-29.) Not so. While it is true that some claimants entered the resolution program and were deemed ineligible for *settlement*, each of those individuals had the option of returning his or her claim to the court system for litigation upon learning of ineligibility for settlement, meaning that ultimate *compensation* remained a possibility were those claimants to prevail at trial or reach some other form of resolution with Merck. (*See* MSA §§ 2.7.3-2.7.3.1.)

Proposal, 2005 U. Ill. L. Rev. 903, 923-25 (differentiating consensual settlements, which are not typically subject to challenge on fairness grounds, and class settlements, which are not treated as contracts and "must be approved by a court"); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519, 555 ("[A]n opt-in process protects client autonomy more fully than the opt-out process of Rule 23 . . . ."), *id.* at 571 ("The client's right to reject a settlement maintains an important incentive on lawyers to negotiate adequate settlements."). Because plaintiffs who were ineligible for settlement or who decided not to opt in remained free to litigate their individual claims against Merck, no one was at risk of being bound against his or her knowledge or consent. Accordingly, the proceedings below were in keeping with both the "letter and spirit" of this Court's prior holdings.

Petitioners suggest that the opt-in character of the settlement was illusory, citing scattered evidence of a supposed conspiracy theory: the failure of the NPC to represent all Vioxx plaintiffs, as evidenced by the MSA's exclusion of plaintiffs with injuries other than heart attacks, strokes or sudden cardiac death (Pet. 21-22); the purported "lack of adversarial presentation" to the district court before it adopted PTOs 28-31 (*id.* 28, 30); and petitioners' own "inference [that] the power of the purse had an influence in letting a wealthy defendant get out cheap" (*id.* 25). Not one of these "facts" – either by itself or in collection with the others – operated to negate the voluntary nature of the MSA. Eligible litigants retained the choice whether to settle, and not everyone did. Those who chose not to settle or who were ineligible for set-

tlement could pursue their claims in court by simply producing a single expert report that they would have inevitably been required to produce in order to take their cases to trial – and many did, belying petitioners' unsubstantiated claim that the MSA accomplished the "extinguishment" of all Vioxx-related claims. (Pet. 21.) Although *petitioners'* claims were extinguished, they affirmatively sought out that result by refusing to comply with the district court's case-management orders.

For all of these reasons, petitioners have failed to demonstrate any question meriting this Court's review, and the petition should therefore be denied.

II. The Court Of Appeals Correctly Applied Established Rules Of Law.

This Court's review is also unnecessary because the decision of the court of appeals was correct.

First, the court of appeals properly applied the settled rule that an individual who is not a party to a private settlement has no standing to challenge it. Second, the court of appeals correctly held that the district court acted within its broad discretion to manage multidistrict proceedings in entering *Lone Pine* discovery orders requiring parties to produce evidence that their claims have merit.

A. Petitioners Do Not Have Standing To Challenge A Settlement To Which They Were Not Parties.

The court of appeals correctly found that petitioners lacked standing to challenge the MSA.

"Generally, a non-settling defendant lacks standing to object to approval of a settlement because the

non-settling defendant is not affected by that settlement." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 103 (S.D.N.Y. 1997) (citing *Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir. 1993) (collecting authority)). This rule has a simple rationale: because non-settling parties cannot be bound by the agreement, their legal rights remain unaffected by it. *See, e.g., New Mexico ex rel. Energy & Minerals Dep't*, 820 F.2d 441, 445 (D.C. Cir. 1987) ("Only the parties who signed the settlement agreement are bound by the contract formed in it."); *see also Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 11, 14 (1st Cir. 1980), *cert. denied*, 449 U.S. 826 (1980).[14]

The same rule applies in the context of class settlements. *See, e.g., Transam. Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992). Thus, class members who opt out of a class settlement lack standing to challenge the settlement. "[O]pting out of a settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it." *Olden v. LaFarge Corp.*, 472

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[14] In addition, "[t]his rule advances the policy of encouraging the voluntary settlement of lawsuits." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001) (quoting *Waller*, 828 F.2d at 583). Voluntary settlements play an essential role in the resolution of mass product liability claims, which are "'ordinarily not appropriate'" for class treatment under Rule 23. *Amchem*, 521 U.S. at 625 (quoting Fed. R. Civ. 23, Advisory Committee Notes, 1966 Amendment).

F. Supp. 2d 922, 930-31 (E.D .Mich. 2007) (citing *Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 426 (6th Cir. 1999); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:55, at 168 (4th ed. 2002)); *see also In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000) (nonsettling plaintiffs lacked standing to challenge class settlement because "the nonsettling plaintiffs have fully preserved their 'right to litigate their claims independently'") (citation omitted); *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) ("[N]onsettling parties in multi-party cases lack standing to object to settlement agreements on appeal.").

In re Vitamins Antitrust Class Actions, 215 F.3d 26, is instructive. There, the class had negotiated a settlement with certain defendants to resolve claims that the appellees had allegedly fixed prices on bulk vitamin sales in violation of antitrust laws. *Id.* at 28. The appellants – who opted out of a class settlement – moved to intervene and challenge the settlement. *Id.* The district court denied the motion to intervene, holding that the appellants lacked standing. *Id.* The D.C. Circuit agreed: "[C]lass members who have opted out of a 23(b)(3) class action have no standing to object to a subsequent class settlement" because "by opting out they 'escape the binding effect of the class settlement.'" *Id.* at 28-29 (quoting *Mayfield*, 985 F.2d at 1093 (class members who opt out cannot challenge class settlements because "those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others")).

The same is true here. Class settlement or not, the MSA could not be challenged by petitioners because they did not participate in it and thus "escape[d] the binding effect of" the program it created. And because petitioners do not have standing, this Court lacks jurisdiction to review their challenge to the MSA. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Petitioners' only apparent theory of standing is that they were injured because the MSA "limit[ed] . . . compensation to heart attacks, ischemic strokes and sudden cardiac death" (Pet. 33) – i.e., that petitioners were prejudiced because the MSA failed to cover their alleged injuries.[15] But that is not a cognizable basis for standing.

To be sure, courts have developed a narrow exception to the general rule barring challenges to settlements by non-settling parties where necessary to shield non-settling parties from "prejudice" created by a settlement. *In re Integra Realty*, 262 F.3d at 1102; *Zupnick*, 989 F.2d at 98; *Mayfield*, 985 F.2d at 1092-93; *Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246-47 (7th Cir. 1992); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990). But "'[p]rejudice' in this context means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action,'" *In re Integra Realty*, 262 F.3d at 1102 (quoting *Mayfield*, 985 F.2d at 1093, and citing *Eichenholtz v. Brennan*, 52 F.3d 478, 482-83 (3d Cir. 1995), *Zupnick*, 989 F.2d at 98, *Alumax Mill Prods., Inc. v. Congress Fin. Corp.*, 912 F.2d 996, 1001-02 (8th Cir. 1990), *Waller*, 828 F.2d at 583, and *In re*

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[15] *See* note 3, *supra*.

Beef Indus. Antitrust Litig., 607 F.2d 167, 172 (5th Cir. 1979)), or where the settlement interferes "with a party's contract rights or a party's ability to seek contribution or indemnification," *Agretti*, 982 F.2d at 247 (citing *Quad/Graphics*, 724 F.2d at 1232).

By contrast, plain legal prejudice is not demonstrated by "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement." *Agretti*, 982 F.2d at 247; *accord, e.g.*, *Eichenholtz*, 52 F.3d at 482-83; *Zupnick*, 989 F.2d at 98; *Alumax Mill Prods.*, 912 F.2d at 1001-02; *Waller*, 828 F.2d at 583; *In re Beef*, 607 F.2d at 172. Nor is it demonstrated by allegations that a defendant has settled with fewer than all plaintiffs, or that such a settlement will remove the "economic incentive to settle with" other parties. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1165 (5th Cir. 1985). Otherwise, there could be no partial settlements, since "*any* settlement with less than all" parties produces some effect on non-settling parties. *Id.* at 1165.

Here, petitioners do not – and cannot – point to any provision in the MSA that affected the rights of any non-settling party to continue pursuit of his or her claim. To the contrary, petitioners have been the masters of their own destinies at all points in time; they filed their own complaints, were free to be represented by their counsel at monthly status conferences throughout the course of the Vioxx multidistrict proceedings, and were free to continue to litigate their claims despite exclusion from the MSA's terms.

Instead, petitioners rely on an assortment of arguments that are nothing more than complaints of strategic advantage and exclusion from settlement –

that Merck's defense strategy made it difficult to try a case (Pet. 27); that the NPC should have sought a settlement that covered petitioners (*id.* 21, 25-26 n.10); and that the district court should somehow have stopped a private settlement (*id.* 27-28).[16] But these are precisely the kinds of arguments that courts have uniformly held *cannot* confer standing on non-settling parties because petitioners do not contend that the settlement agreement extinguished their causes of action or other legal rights.

Accordingly, the court of appeals correctly held that petitioners sustained no plain legal prejudice from the MSA and thus lack standing to challenge it.

B. The District Court Acted Within Its Discretion In Adopting Discovery Orders For Non-Settling Plaintiffs.

Just as Petitioners have failed to raise any viable grounds that provide them standing to challenge the MSA, they have also failed to provide any reason why the district court abused its discretion in entering PTOs 28 and 29.

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[16] It is clear that the thrust of petitioners' complaint is not that they were unable to pursue their claims in court, but that they were somehow entitled to have their claims compensated under the MSA regardless of eligibility or merit. (*See* Pet. 22 (denying that petitioners ever want "their day in court" and stating that a "representative suit" – presumably one conceived, financed and prosecuted by others, since petitioners suggest that the production of one expert report is too burdensome for them (*id.* 15-16) – "may be an appropriate vehicle to resolve their claims").) Not surprisingly, petitioners offer no support for this absurd proposition.

As the court of appeals recognized, district courts have wide discretion to manage discovery in the proceedings over which they preside. *See, e.g.*, *Burns v. Universal Crop Prot. Alliance*, No. 4:07-CV-535, 2007 U.S. Dist. LEXIS 71716 (E.D. Ark. Sept. 25, 2007); *Ramos v. Playtex Prods., Inc.*, Nos. 08-CV-2703, 08-CV-2828, 08-CV 3352, 2008 WL 4066250, at *6 (N.D. Ill. Aug. 27, 2008). Moreover, such "broad discretion is particularly important in complex litigation." *Munoz v. Orr*, 200 F.3d 291, 305 (5th Cir. 2000); *see also Acuna*, 200 F.3d at 340; 6A Charles Alan Wright et al., *Federal Practice & Procedure* § 1525, at 112 (3d ed. 2010) ("Rule 16(c)(2)(L) explicitly authorizes the adoption of special procedures to expedite the adjudication of potentially difficult or protracted cases . . . ."). Indeed, management of discovery is one of the primary purposes underlying 28 U.S.C. § 1407. (*See* Pet. 26 (recognizing that MDL proceedings were designed to effectuate "consolidated discovery" and that "the district court necessarily had to enjoy broad ranging discretionary authority to manage litigation").)

A district court's discretion to manage complex, multidistrict proceedings includes the power to issue *Lone Pine* orders, as recognized by both the court below and other courts of appeals. *See Acuna*, 200 F.3d at 340 ("It was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require."); *cf., e.g.*, *Medalie v. Bayer Corp.*, 510 F.3d 828, 830 (8th Cir. 2007) (acknowledging district court's use of such orders and upholding dismissal based on lack of compliance with such orders); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500-01 (9th Cir. 1994) (upholding dismissal based on infirmity of expert affidavits

filed in connection with such orders). *Lone Pine* orders are widely recognized as an effective way to "cull potentially meritless claims and streamline litigation in complex cases," *Baker v. Chevron USA, Inc.*, No 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007), by "requir[ing] plaintiffs to establish certain elements of their claims through expert affidavits," *Acuna*, 200 F.3d at 338.

Relatedly, dismissal is a firmly established sanction for noncompliance with the trial court's orders. *See, e.g.*, *Medalie*, 510 F.3d at 830 (affirming dismissal of personal injury claim because plaintiff had "failed to comply with the discovery order to submit an expert's report attesting personal injuries from use of Baycol"); *Acuna*, 200 F.3d at 340; *Claar*, 29 F.3d at 500-501 (affirming grant of summary judgment because physicians' affidavits failed to meet the requirements of case management order); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990).

The district court acted consistently with this precedent in adopting PTOs 28 and 29, which were carefully crafted to "strike [a] balance between efficiency and equity," *In re Vioxx*, 557 F. Supp. 2d at 744, while preparing the parties for the next phase of litigation. These PTOs merely required all plaintiffs, including petitioners, to produce what experience has shown to be indispensable for trial: expert evidence of specific causation (i.e., that Vioxx actually caused the plaintiff's injury).

Petitioners question the merit of PTOs 28 and 29, contending that they were unnecessary and burdensome. But neither argument has merit. Even petitioners acknowledge the critical role played by

specific-causation evidence in the underlying litigation, arguing that most of Merck's trial wins resulted from the "individual plaintiff's inability to prove specific causation." (Pet. 29 n.12.) A preliminary determination of whether any such evidence exists for a particular plaintiff would thus figure heavily in both sides' decision either to try a case or attempt to resolve it in some other fashion.

Petitioners' claim of burdensomeness likewise fails. The PTOs simply required petitioners to produce evidence that they should have had before bringing suit; as the district court put it, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *In re Vioxx*, 557 F. Supp. 2d at 744 (*quoting Acuna*, 200 F.3d at 340); *see also Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006). For this reason, petitioners' suggestion that the PTOs "drove up plaintiffs['] litigation costs" (Pet. 16) is difficult to understand. If petitioners are suggesting that they were compelled to hire an expert, that suggestion lacks merit. The district court was clear that any report from a treating physician would do – it was "not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial." *In re Vioxx*, 557 F. Supp. 2d at 744.[17]

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[17] Petitioners' rhetoric regarding their inability to "reach the courthouse steps on the merits of their claims" rings hollow. (Pet. 27.) The Federal Rules establish myriad tools to weed out frivolous or meritless claims, and, thus, many such cases never reach the merits stage of litigation. *See, e.g.*, Fed. R. Civ. P. 12.

Petitioners also complain about the process by which PTOs 28 and 29 were adopted, contending that there was a "lack of adversarial presentation" – and that the orders subjected non-settling plaintiffs to "assembly line motions to dismiss." (Pet. 28, 30.) That is not a fair characterization. Although the district court entered the orders on its own initiative, those orders were subjected to testing by the adversarial process for more than a year thereafter, at the (repeated) behest of petitioners and other litigants below. The deadlines for compliance were officially extended once for all plaintiffs and then unofficially extended several additional times for petitioners, as they filed motion after motion seeking vacatur of the order and recusal of the district court judge below. It was only after petitioners made it apparent that they would never comply with these orders that the district court dismissed their claims.[18] As the court explained: "[I]t is now a year and a half since many of the plaintiffs in these cases were first directed to produce expert reports, but, rather than simply comply with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable. . . . At this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29." (Pet. App. C, at 23a-24a.)

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[18] The district court also noted that petitioners' counsel had engaged in such tactics outside of the instant MDL proceeding and, as a result, had been denied *pro hac vice* admission in at least one other jurisdiction. (*See* Pet. App. C, at 25a & n.3.)

For all of these reasons, the district court acted well within its discretion in issuing and enforcing PTOs 28 and 29.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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January 21, 2011

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX 1657	*	MDL Docket No.
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
	*	
	*	MAG. JUDGE
	*	KNOWLES
* * * *	*	

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER NO. 28
***Prima Fade* Evidence of Usage, Injury and Causation),**

This Order requires all parties who are (1) plaintiffs with personal injury claims pending in MDL Docket No, 1657 ("Plaintiff' or "Plaintiffs") as of November 9, 2007, or (2) claimants who have sought tolling pursuant to the tolling agreement dated June 1, 2005 (collectively "Claimant" or "Claimants") to produce specified information regarding their claims, unless the claim is eligible for, and has been submitted to, the Resolution Program. This Order, however, does *not* apply to plaintiffs who file claims after November 9, 2007 ("Post 11.09 Plaintiffs"). Post

11.09 Plaintiffs are covered by a separate order, Pretrial Order No. 29. Persons who represent themselves *pro se* in this proceeding shall comply fully with all obligations required of counsel by this Order, unless otherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. Within sixty (60) days of entry of this Order, counsel for a Plaintiff or Claimant subject to this Order shall notify the following individuals or entities, by registered mail, that they may have records relevant to the Plaintiff's or Claimant's claim in this MDL Proceeding ("Claim") and that any records relating to the Plaintiff or Claimant must be preserved pursuant to Pretrial Order No. 1 entered by this Court on February 17, 2005 (the "Notice"), pending collection by the Plaintiff or Claimant:

1. All Pharmacies that dispensed any medications to the Plaintiff or Claimant for the period from January 1, 1995 to the present;

2. All Physicians, Medical Facilities, other Healthcare Providers and/or other persons ("Other Providers") who Plaintiff or Claimant claims provided any samples of Vioxx to the Plaintiff or Claimant;

3. All Physicians, Medical Facilities and/or other Healthcare Providers who prescribed Vioxx for the Plaintiff or Claimant;

4. All Physicians and/or other Healthcare Providers who treated Plaintiff or Claimant for the period from January 1, 1995 to the present; and

5. If Plaintiff or Claimant is seeking lost wages, all of his employers for the period from three years prior to the date for which he is seeking lost wages through the last day for which Plaintiff or Claimant is seeking lost wages.

B. A copy of Pre Trial Order No. 1 shall be attached to the Notice and all copies of the Notice shall be preserved by Counsel for Plaintiff or Claimant for so long as the claim remains pending in this Proceeding.

C. By no later than March 15, 2008, Plaintiff or Claimant shall serve a statement listing the names and addresses of all individuals or entities to which Notices were sent, along with copies of the Notices and a signed

certification that the Notices were sent as required by this Order. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

D. Plaintiffs or Claimants who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff or Claimant fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice or, if tolled, why the tolling for that Claimant should not be terminated. Plaintiff or Claimant shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice or, if tolled, the termination of tolling for that claim, except for good cause shown.

E. Plaintiff or Claimant may not seek to introduce into evidence at trial any document or information asserting that Vioxx was dispensed by a pharmacy or that Vioxx was provided to the Plaintiff or Claimant as a sample if a Notice were not sent to the Plaintiff's or Claimant's pharmacy, physician, other healthcare provider and/or Other Provider as required by this Order, except upon leave of court for good cause shown. A Plaintiff or Claimant who fails to comply with this Order may also be subject to other sanctions or orders.

II. DISCOVERY REQUIREMENTS

A. All Plaintiffs or Claimants who claim to have suffered an injury as a result of taking Vioxx must produce all of the information described in this Section II unless (a) the injury alleged is a Myocardial Infarction ("MI"), Sudden Cardiac Death ("SCD"), or Stroke as those terms are defined, infra., in Section III, *and* (b) the Plaintiff or Claimant has submitted the claim to the Resolution Program:

1. All pharmacy records regarding the dispensing of drugs to the Plaintiff or Claimant for the period from January 1, 1995 to

the present, along with a signed certification from the respective pharmacy or pharmacies indicating that the production is complete.

2. If any death is claimed, a statement to that effect along with a copy of the death certificate and autopsy report, if one was performed.

3. For Plaintiffs or Claimants alleging a MI, SCD or Stroke Injury, an Amended and Supplemental Plaintiff Profile Form" ("ASPPF") and authorizations or "Claimant Profile Form" ("CPF") in a form attached hereto as Exhibit A unless Plaintiff or Claimant has as of the date of this Order submitted a Plaintiff Profile Form or Claimant Profile Form. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

4. For Plaintiffs not alleging a MI, SCD or Stroke Injury, an ASPPF and authorizations in the forms attached hereto as Exhibit A and served in accordance with the service methods of PTO 8 and paragraphs 5 through 9 of 18C.

5. Answers to the Interrogatories set out as Exhibit B. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

6. All medical records relating to the Plaintiff or Claimants from all healthcare providers requested in the Amended and Supplemental Plaintiff Profile Form for the period from January 1, 1995 to the present, along with a signed certification from each healthcare provider who has records relating to the Plaintiff indicating that all records in the possession, custody or control of the Provider have been produced. Service by Plaintiffs shall be made in accordance with the service

procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

7. An affidavit signed by the Plaintiff or Claimant (i) attesting that records have been collected from all pharmacies that dispensed drugs to, or for, the Plaintiff or Claimant; (ii) attesting that all medical records described in subparagraph (6) above have been collected; and (iii) attesting that all records collected pursuant to subparagraphs A (1), (2) and (6) have been produced pursuant to this Order, along with an index or list identifying the source of the records. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

8. A Rule 26(a)(2) case specific expert report from a medical expert attesting (1) to a

reasonable degree of medical probability that the Plaintiff or Claimant suffered an injury and (ii) that Vioxx caused the injury. The case specific expert report must include (i) an explanation of the basis of the attestation that Vioxx caused the Plaintiff or Claimant to suffer the injury, (ii) an identification of any other causes that were considered in formulating the opinion, (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) and identification of all documents relied on by the expert in forming his opinions.

B. If any of the documents described in paragraphs (A) (1), (2) and (6) above do not exist, the Plaintiff shall state that fact in his or her affidavit and the reason why they do not exist and provide a certified "No Records Statement" from the pharmacy or healthcare provider.

C. Plaintiffs and Claimants shall produce the items set forth above in this Section II in accordance the following schedule:

1. For Plaintiffs and Claimants whose last name begins with the letters A through L, on or before May 1, 2008;

2. For Plaintiffs and Claimants whose last name begins with the letters M through Z, on or before July 1, 2008.

3. Plaintiffs shall serve the items set forth above in accordance with the service procedures of PTO 8 and paragraphs 5 through 7 of PTO 18C. Claimants shall serve the items set forth above on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC

4. Plaintiffs whose cases are subsequently transferred or removed to this Court shall produce the items set forth above within sixty (60) days of removal (measured from the date the notice of removal is filed in this Court) or transfer (measured from the date of filing in this Court of the Transfer Order issued by the Judicial Panel on Multidistrict Litigation) of their case to this proceeding.

D. Plaintiffs or Claimants who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff or Claimant fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice or, if tolled, why the tolling for that Claimant should not be terminated. Plaintiff or Claimant shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice or, if tolled, the termination of tolling for that claim.

E. Nothing in this Order abrogates or replaces each Plaintiff's obligation to submit the Plaintiff Profile Form, authorizations, and other materials required under Pretrial Order 18C. The Plaintiff need not re-submit a Plaintiff Profile Form if one has already been submitted with respect to his or her claim.

III. DEFINITIONS

A. For purposes of this Order only, "Myocardial Infarction" ("MI") is defined as follows:

1. A final or discharge diagnosis in contemporaneous medical records of a myocardial infarction or heart attack; or

2. A diagnosis or affirmative finding in the contemporaneous medical records (e.g., a report of consultation) by a cardiologist of a myocardial infarction or heart attack; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating cardiologist that the Event was a myocardial infarction or heart attack; provided that, in either instance, the final or discharge diagnosis does not rule out a myocardial infarction; or

3. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, new

pathological Q waves in two or more contiguous leads; or

4. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, (i) Signs and symptoms described in medical records of a heart attack (including but not limited to chest pain, pressure, tightness or discomfort, pain or discomfort in the upper areas of the body including but not limited to one or both arms, the back, neck, jaw or stomach, or shoulders; shortness of breath, weakness, dizziness, cold sweat, or excessive sweating, nausea, weakness, fatigue, loss of consciousness or posture, lightheadedness, feeling of faintness, heart-burn or indigestion sensations, feelings of restlessness or anxiousness, a sense of impending doom, disorientation, lips, hands or feet turning slightly blue, abnormal heart rhythms (arrhythmias), or loss of consciousness, cardiac arrest, blood pressure fluctuations or drops requiring medical intervention) or new ischemic ST-T wave changes on an electrocardiogram in two or more contiguous leads; AND (ii) a

rise and fall of cardiac enzymes that includes a rise in serum creatine kinase MB (CK-MB) to greater than two times the upper limit of normal (based on the individual's laboratory's normal range) or a rise in serum cardiac troponin greater than two times the upper limit of normal that a given laboratory considers diagnostic for infarctions. (In the event that the laboratory records do not reflect the normal diagnostic range for troponin that is utilized by that specific laboratory, a rise in the troponin to greater than 1.5 ng/ml shall be deemed to indicate a myocardial infarction.)

5. An event is not a myocardial infarction under definition Nos. 3 or 4 above, if myocardial infarction is ruled out as a diagnosis in the discharge summary or by an in-house cardiology consult at the time of the event, or the final diagnosis is angina or unstable angina.

B. For purposes of this Order only, "Sudden Cardiac Death" ("SCD") is defined as a witnessed instantaneous or near-instantaneous unexplained death

that occurs without warning or within one hour of non-diagnostic symptoms, or, an unwitnessed, unexpected sudden death in which criteria for a fatal coronary, cerebrovascular event or other cause or event are not met.

C. For purposes of this Order only, "Ischemic Stroke" ("Stroke") is defined as:

1. A final or discharge diagnosis in contemporaneous medical records of an ischemic stroke or ischemic cerebrovascular event or accident (*i.e.*, ischemic stroke, intracranial thrombosis, cerebral embolism, thrombotic stroke, embolic stroke, lacunar infarct, lacunar stroke, thrombotic occlusion, cerebrovascular event or accident that is not a primary hemorrhagic event, and cerebral infarction; or a hemorrhagic stroke that is secondary to the terms previously listed); or

2. If the final or discharge diagnosis is silent as to whether or not claimant had an Ischemic Stroke, a diagnosis or affirmative finding in the contemporaneous medical records (*e.g.*, a report of

consultation) by a neurologist of an Ischemic Stroke; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating neurologist that the Event was an Ischemic Stroke.

3. For purposes of this Order only, an Event is **not** an Ischemic Stroke if:

a. stroke or cerebrovascular accident is ruled out as a diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event;

b. hemorrhagic stroke or hemorrhagic cerebrovascular accident is the diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event, This definition does not include a hemorrhagic stroke that

is secondary to an Ischemic Stroke; or

c. transient ischemic attack is the diagnosis in the discharge summary or is the diagnosis of a treating neurologist within 14 days of discharge from the hospitalization related to the Event.

IV. PENALTIES FOR FRAUD AND DECEPTION

Any Plaintiff (and his or her attorneys) who submits false or intentionally misleading information, or otherwise attempts to satisfy the documentation requirements of this Order through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs) and dismissal with prejudice pursuant to Fed. R. Civ. P. 37.

New Orleans, Louisiana, this _____ day of _____, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	**MDL Docket No. 1657**
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	**SECTION L**
	*	
	*	**JUDGE FALLON**
THIS DOCUMENT		
RELATED TO		
ALL CASES		
	*	**MAG. JUDGE**
	*	**KNOWLES**
* * * *	*	

PRETRIAL ORDER NO. 29
Rules and Procedures Relating to
All Cases Filed or Transferred On or After
November 9, 2007

This Order applies to all plaintiffs who file personal injury claims directly in, or whose claims are transferred into, MDL Docket No. 1657 on or after November 9, 2007 ("Post 11.09 Plaintiffs"). Persons who represent themselves *pro se* in this proceeding shall comply fully with all obligations required of counsel by this Order, unless otherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. Prior to filing a claim, counsel — or if a plaintiff is proceeding *pro se*, the plaintiff — shall be responsible for ensuring that all records in the possession of the plaintiffs' pharmacies and healthcare providers as described in paragraph (B) below have been preserved, collected and reviewed. Within thirty (30) days of agreeing to accept a client for purposes of pursuing Vioxx litigation, counsel shall notify the individuals or entities listed below in Paragraph B, by registered mail, that they may have records relevant to the putative plaintiff's ("Plaintiff or Plaintiff's") claim in this MDL proceeding ("Claim") and that any records relating to the Plaintiff must be preserved pursuant to Pretrial Order No. 1 entered by this Court on February 17, 2005 (the "Notice"), pending collection by the Plaintiff. Plaintiffs proceeding *pro se* must notify the individuals or entities listed below in Paragraph 2 within thirty (30) days of filing an action.

B. The following individuals or entities must be notified pursuant to Paragraph 1 above:

1. All Pharmacies that dispensed any medications to the Plaintiff for the period from January 1, 1995 to the present;

2. All Physicians, Medical Facilities, other Healthcare Providers and/or others persons ("other Providers") who Plaintiff claims provided any samples of Vioxx to the Plaintiff;

3. All Physicians, Medical Facilities and/or other Healthcare Providers who prescribed Vioxx for the Plaintiff;

4. All Physicians and/or other Healthcare Providers who treated Plaintiff for the period from January 1, 1995 to the present; and

5. If Plaintiff is seeking lost wages, all of his/her employers for the period from three years prior to the date for which he/she is seeking lost wages through the last day for which Plaintiff or Claimant is seeking lost wages.

C. A copy of Pre Trial Order No. 1 (Paragraph 13 — Preservation of

Evidence) shall be attached to the Notice and all copies of the Notice shall be preserved by Counsel for Plaintiff for so long as the claim remains pending in this Proceeding.

D. Within ten (10) days of filing a claim, Plaintiff shall serve a statement listing the names and addresses of all individuals or entities to which Notices *were* sent, along with copies of the Notices and a signed certification that the Notices were sent as required by this Order. Service shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C.

E. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion

within the required period of time shall lead to the dismissal of the claim with prejudice, except for good cause shown.

F. Plaintiff may not seek to introduce into evidence at trial any document or information asserting that Vioxx was dispensed by a pharmacy or that Vioxx was provided to the Plaintiff as a sample if a Notice were not sent to the Plaintiff's pharmacy, physician, other healthcare provider and/or Other Provider as required by this Order, except upon leave of court for good cause shown. A Plaintiff who fails to comply with this Order may also be subject to other sanctions or orders.

II. DISCOVERY REQUIREMENTS

A. Within forty-five (45) days of filing his or her claim in this MDL, or within forty-five (45) days of their case being transferred (measured from the date of filing with this Court of the Transfer Order issued by the Judicial Panel on Multidistrict Litigation) or removed (measured from the date of filing with this Court of the Notice of Removal) to this MDL, all Post 11.09 Plaintiffs who claim to have suffered an injury as a result of the use of Vioxx must produce the following information:

1. All pharmacy records regarding the dispensing of drugs to the Plaintiff for the period from January 1, 1995 to the present, along with a signed certification from the respective pharmacy or pharmacies indicating that the production is complete.

2. All medical records relating to the Plaintiff from all healthcare providers requested in the Amended and Supplemental Plaintiff Profile Form for the period from January 1, 1995 to the present, along with a signed certification from each Healthcare Provider who has records relating to the Plaintiff indicating that all records in the possession, custody or control of the Provider have been produced.

3. If any death is claimed, a statement to that effect along with a copy of the death certificate and autopsy report, if one was performed.

4. An Amended and Supplemental Plaintiff Profile Form (attached as Exhibit A), records requested therein, and executed

Authorizations for Release of Records pursuant to PTO 18A, B or C, as applicable. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO IBC. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

5. Answers to the Interrogatories set our in Exhibit B. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

6. An affidavit signed by the Plaintiff (i) attesting that records have been collected from all pharmacies that dispensed drugs to, or for, the plaintiff; (ii) attesting that all medical records described in paragraph (2) above have been collected; (iii) attesting that all records collected pursuant to subparagraphs (1), (2) and (3) have been produced

pursuant to the Order, along with an index or list identifying the source of the records; and (iv) citing the specific page of the medical records containing the diagnosis of the alleged injury.

7. A Rule 26(a)(2) case-specific expert report from a medical expert attesting (i) that the Plaintiff suffered an injury and (ii) that Vioxx caused the injury. The case-specific expert report must include (i) an explanation of the bases of the attestation that Vioxx caused the plaintiff to suffer the injury; (ii) an identification of any other causes that were considered in formulating the opinion; (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) an identification of all documents relied on by the expert in forming his opinions.

B. If any of the documents described in paragraphs A (1), (2) and (3) do not exist, the Plaintiff shall state that fact in his or her affidavit and the reason why they do not exist and provide a certified "No

Records Statement" from the pharmacy or healthcare provider.

C. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Modem to Show Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice.

D. Nothing in this Order abrogates or replaces each Plaintiff's obligation to submit the Plaintiff Profile Form, authorizations, and other materials required under Pretrial Order 18C. The Plaintiff need not re-submit a Plaintiff Profile Form if one has already been submitted with respect to his or her claim.

III. ATTORNEYS' FEES FOR POST 11.09 PLAINTIFFS

This Court finds that:

A. The Status of the Litigation:

1. Prior to September 30, 2004, approximately 400 lawsuits had been filed against Merck & Co. by plaintiffs alleging various injuries from the use of Vioxx. In New Jersey, an Order had been entered on May 20, 2003 establishing a coordinated proceeding for Vioxx litigants and, on September 30, 2002, an Order was entered in California for the same purpose.

2. On September 30, 2004, Merck withdrew Vioxx from the market. The withdrawal of Vioxx led to extensive publicity nationwide in newspapers and magazines, on television and radio, and across the Internet. While plaintiffs' counsel had extensively advertised seeking clients to pursue claims against Merck relating to the use of Vioxx before September 30, 2004, that

advertising increased markedly throughout the country after the withdrawal. Like the publicity relating to the withdrawal, the advertising apprised the public of possible claims they might have against Merck in connection with the use of Vioxx.

3. By December 31, 2004, three months after the withdrawal of Vioxx, approximately 923 lawsuits were on file, encompassing approximately 3291 plaintiffs.

4. On February 16, 2005, the Judicial Panel on Multi District Litigation ruled that cases alleging injury from the use of Vioxx pending in various federal courts across the country should be transferred to one district court for coordination. The Panel decided that the cases should be transferred to the Eastern District of Louisiana in New Orleans and appointed the undersigned to conduct the consolidated and coordinated proceedings.

5. By the first year anniversary of the withdrawal of Vioxx, more than 8,900 Vioxx lawsuits had been filed involving more than 18,500 plaintiffs. As of the date of this Order, there are more than 26,800 active Vioxx cases on file in various courts throughout the country, involving more than 47,500 plaintiffs and an additional 13,000 claims on tolling agreements for a total of more than 60,500 claimants. By any measure, the scale of this litigation is large.

6. Discovery in this litigation has also been extensive. More than 54 million pages of documents and a terabyte of data have been produced by Merck pursuant to various requests from plaintiffs' counsel along with another 86 million pages of data from Merck Profile Forms. More than 1,800 depositions have also been taken in the litigation and depositions have consumed more than 2,000 days and comprise more than 380,000 pages of testimony. Also, more than fifteen trials have been conducted, including six in this Proceeding;

B. Pharmaceutical Tort Litigation and Contingent Fees.

1. It is the practice in the United States for lawyers bringing claims on behalf of clients in personal injury actions to be compensated pursuant to contingent fee agreements. That is, the lawyer's fee is contingent on the lawyer's success in the recovery of compensation from another party for his client.

2. In large-scale pharmaceutical tort litigation, it is particularly commonplace for lawyers representing plaintiffs to be compensated through contingent fees.

3. Large-scale pharmaceutical tort litigation (which can be similar to traditional mass tort litigation in scale) can be, and usually is, extraordinarily expensive, particularly in the early stages. It is well understood that proving cases in mass tort litigation, at least at first, is expensive. Experts of various kinds may be needed and discovery from the

defendants may take a long time and much effort.

4. However, the cost and risk inherent in prosecuting the first series of claims in a large-scale pharmaceutical tort is not the same throughout the litigation.

5. Because of the extensive publicity and extensive advertising that followed the withdrawal of Vioxx, users of Vioxx (and their lawyers) have had ample notice of the possibility that they may have a claim against Merck in connection with their use of the drug. The uncertainty of the number of potential claims in a litigation of this magnitude makes the management of this proceeding exceedingly difficult both for the parties and the Court.

C. The Vioxx litigation is an extremely mature litigation. To date, MDL and state court lawyers have tried 17 cases and taken over 1,800 depositions; more than 50 million pages of documents have been produced, and an enormous volume of electronic data, and substantial Third Party discovery has occurred. Because of this extensive work

done by the PSC and certain state court lawyers, the cost of litigating Vioxx claims has been substantially reduced.

D. Given the extensive amount of discovery and trial preparation that has been undertaken and already achieved — as well as the work on, and lessons learned from, bellwether trials conducted in this Court and others over the last several years — counsel filing new claims can reasonably expect to expend much less time and resources prosecuting those cases than counsel who have been involved in those proceedings from the beginning, and I encourage counsel to consider such disparity in negotiating attorneys' fees.

IV. PENALTIES FOR FRAUD AND DECEPTION

Any Plaintiff (and his or her attorneys) who submits false or intentionally misleading information, or otherwise attempts to satisfy the documentation requirements of this Order through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs) and dismissal with prejudice pursuant to Fed. R Civ. P. 37. Post 11.09 Plaintiffs who fail to fully comply with the requirements of this Order may be subject to sanctions and dismissal of their claims pursuant to Fed. R. Civ. 37.

New Orleans, Louisiana, this ____ day of November, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
This document	*	
related to:	*	
ALL CASES	*	MAG. JUDGE
	*	KNOWLES
	*	
* * * *	*	

PRETRIAL ORDER NO. 30

Having reviewed the Resolution Program agreement entered into by the PSC and Merck on November 9, 2007, the Court finds that with some exceptions, further activity in this MDL proceeding should be stayed temporarily in order to give each eligible plaintiff, with the advice of counsel, sufficient time to determine whether it is in his or her best interest to participate in the Resolution Program, and to give counsel sufficient time to comprehend the Resolution Program and advise their clients accordingly.

Accordingly, the Court hereby **ORDERS** as follows.

- All activities in this MDL proceeding (including all activities in each case in which a plaintiff is eligible to participate in the Resolution Program) are hereby stayed pending further order of this Court, except as follows:
  - The stay shall not apply to cases currently pending in this proceeding that are not eligible for participation in the Resolution Program, but only to the extent that plaintiffs are required to engage in certain discovery and other pretrial activities by Pretrial Order 28, entered by this Court on November 9, 2007.
  - The stay shall not apply to any cases in this proceeding (or that may be later transferred into this proceeding) filed on or after November 9, 2007, but only to the extent that plaintiffs are required to engage in certain discovery and other pretrial activities by Pretrial Order 29, entered by this Court on November 9, 2007.
  - This Order shall not operate to stay the various *de bene esse* depositions that the parties previously scheduled, including the discovery depositions related thereto. Such depositions will be important to the outcome of this litigation, regardless of whether individual plaintiffs choose to participate in the Resolution Program.

- At the appropriate time, the Court intends to issue a further order lifting this stay with respect to the eligible plaintiffs who decide not to participate in the Resolution Program. Further, the Court will consider motions to lift the stay with respect to specific activities in this litigation upon good cause shown.

IT IS SO ORDERED.

New Orleans, Louisiana, this _____ day of November, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
	*	
	*	MAG. JUDGE
	*	KNOWLES
* * * * *		

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER No. 31
(Registration of Claims)

The Court hereby orders as follows with respect to the registration of claims:

(1) The Court hereby orders the registration of claims as follows:

(a) All Counsel of Record in this proceeding shall be responsible for designating Primary Counsel for any claim pending in this coordinated proceeding in which they have an Interest (as defined below in paragraph 5) and that Primary Counsel

shall register such claims in accordance with this Order.

(b) All Counsel of Record in this proceeding who have at any time submitted a request for tolling for a claimant (hereinafter "Tolling Claimant") pursuant to the Notice of Filing of Tolling Agreement which was filed in Federal Multidistrict Litigation No. 1657 on June 9, 2005 (hereinafter "Tolling Agreement") shall designate Primary Counsel for each Tolling Claimant's claims, and that Primary Counsel shall register such claims in accordance with this Order.

(c) All Counsel of Record with claims pending in this proceeding shall register (or *ensure* that other attorneys register) all claims in which they have an Interest (as defined below in Paragraph 5) that are pending in any court or other tribunal in the United States.

(d) All persons who represent themselves *pro se* in this proceeding shall register their claims in accordance with Paragraph 4 below.

(2) The registration of claims by counsel shall be provided in the form of a Registration Affidavit and its Exhibit 1, altogether set forth as Exhibit A to this Order. Counsel shall provide the information required by Exhibit A completely and accurately. The form shall provide the information required as of (a) October 1, 2007, (b) November 9, 2007, and (c) the date on which the Registration Affidavit is served and filed. The

Registration Affidavit shall be filed no later than January 15, 2008.

(3) Registration Affidavits, along with their exhibits, shall be served on Defendant Merck & Co., Inc. ("Merck"), the Executive Committee to the Plaintiffs' Steering Committee ("PEC"), and the Claims Administrator.

(4) Persons who represent themselves *pro se* in this proceeding shall complete the *Pro Se* Registration Affidavit attached hereto as Exhibit B and shall serve Defendant Merck, PEC, and the Claims Administrator, by no later than January 15, 2008.

(5) Counsel shall be deemed to have an "Interest" in the claim of a Plaintiff or Tolling Claimant if Counsel or any person affiliated with, or related in any way to, Counsel: (a) has an engagement or retainer agreement with such Plaintiff or Tolling Claimant; (b) is listed as the counsel of record for such Plaintiff in filed pleadings related to Vioxx; (c) has entered a Tolling Claimant into a Tolling Agreement; (d) has entered an appearance for such Plaintiff or Tolling Claimant in any legal action related to Vioxx; (e) would benefit directly or indirectly from any payment to settle any claim of such Plaintiff or Tolling Claimant connected with Vioxx; or (f) otherwise has any financial interest of any kind whatsoever in any claim of such Plaintiff or Tolling Claimant connected with Vioxx.

(6) Primary Counsel shall file the Registration Affidavit and its Exhibit 1 in the manner applicable in this coordinated proceeding for filing documents with the Court under seal. *Pro Se* Claimants shall do likewise with respect to their *Pro Se* Registration Affidavit. Primary Counsel shall also

serve the Registration Affidavit and its Exhibit 1 on Merck, the PEC, and the Claims Administrator via electronic mail. Specifically, Primary Counsel shall attach three files to a single electronic mail message—(i) the executed Registration Affidavit in Adobe pdf format; (ii) Exhibit 1 to the Registration Affidavit in Excel format; and (iii) a certification of service in Adobe pdf format—and send that message to the following addresses:

a. **For Merck:**
registration@hugheshubbard.com

b. **For the PEC:** rherman@hhkc.com

c. **For the Claims Administrator:**
claimsadmin@browngreer.com

(7) The subject line in the email should state: "Registration Affidavit and Exhibit 1 for [insert name of firm]. *Pro Se* Claimants shall serve their Registration Affidavits on Merck, PEC and the Claims Administrator at the above email addresses. If the *Pro Se* Claimant does not have access to email, the Plaintiff or Tolling Claimant shall send the Registration Affidavit via U.S. Mail **postmarked no later than January 8, 2008** to:

Claims Administrator
115 S. 15th Street
Suite 400
Richmond, VA 23219-4209
Main Number: 804.521.7200

(8) Primary Counsel and *Pro Se* Claimants must certify in lieu of oath [pursuant to 28 U.S.C. § 1746] that the information contained in the

Registration Affidavit is true and correct to his or her knowledge. Intentionally incomplete or misleading responses shall subject Primary Counsel and *Pro Se* Claimants to sanctions.

(9) Primary Counsel shall serve a revised Registration Affidavit and Exhibit 1 when he or she acquires or loses his or her Interest in a Plaintiff's or Tolling Claimant's claim, when he or she becomes Primary Counsel or ceases to be Primary Counsel, or when because of changed circumstances his or her Registration Affidavit otherwise becomes materially untrue, in whole or in part. In such instances, Primary Counsel must serve a true and correct Registration Affidavit within 30 days of the changed circumstances. The revised Registration Affidavit shall identify all Plaintiffs and Tolling Claimants in whose claims Primary Counsel has an Interest as of the date that he or she executes the Registration Affidavit. This obligation shall terminate on September 1, 2008.

(10) The Court expects all Counsel and all *Pro Se* Plaintiffs and Tolling Claimants to comply with this Order. Failure to meet the requirements of this Order by the deadlines set herein will subject non-compliant Counsel to a show cause hearing as to why they have not complied with this Order and as to why claims in which they have an Interest should not be dismissed.

_____, this _____ day of
_____, 2007.

_____
JUDGE

Exhibit A

Registration Affidavit

I, _____, hereby certify [pursuant to 28 U.S.C. § 1746] as follows:

1. I am an attorney in good standing who is admitted to practice law in the State of _____ _____. The name and address of my law firm are:

_____

Law Finn

_____

Street

_____

City State Zip Code

2. I make this certification pursuant to Pretrial Order No. ___ entered in [the current coordinated proceeding].

3. Exhibit 1 to this certification contains a true and complete list of all of the Plaintiffs and/or Tolling Claimants in which I have an "Interest" and for whom I am "Primary Counsel" along with a notation of all firms with an Interest in Each Claim as of October 1, 2007.

I certify under penalty of perjury that the foregoing is true and correct.

_____

Primary Counsel

Sign ONE of the statements below:

1. I, _____, on behalf of myself and all other counsel with an Interest in the cases listed in Exhibit 1, agree to the terms of the MSA and will recommend all Plaintiffs and/or Tolling Claimants listed on Exhibit I should enroll in the Program.

_____

OR

2. I, _____, do not agree to the terms of the MSA and will not recommend that any of the Plaintiffs and/or Tolling Claimants listed on Exhibit I enroll in the Program.

_____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX	:	MDL NO. 1657
	:	
PRODUCTS	:	
LIABILITY	:	
LITIGATION	:	SECTION: L
	:	
	:	JUDGE FALLON
	:	MAG. JUDGE KNOWLES

.. ..

THIS DOCUMENT RELATES TO:

David Agard, et al. v. Merck & Co.,	05-1089
Glenn Dier, et al. v. Merck & Co.,	05-1088
Adnan Aljibory, et al. v. Merck & Co.,	05-1090
Rosemary Holobosky, et al. v. Merck & Co.,	05-1091
Marjorie Connolly, et al. v. Merck & Co.,	06-2708
Marilyn Core, et al. v. Merck & Co.,	05-2583
Carlo Devincentiis, et al., v. Merck & Co.,	05-2297
Kathleen Hoffner, et al. v. Merck & Co.,	06-2238
Robert D. Gates, et al. v. Merck & Co.,	05-6221

ORDER & REASONS

Before the Court are certain Plaintiffs' Motion for Miscellaneous Relief (Rec. Doc. 14938) and Motion for a Stay (Rec. Doc. 16803). For the following reasons, both motions are DENIED.

I. BACKGROUND

On November 9, 2007, the parties announced the establishment of a Vioxx Resolution Program that encompasses all claims that allege a heart attack, sudden cardiac death, or stroke.[1] Also on that date, the Court entered two pre-trial orders requiring Plaintiffs to provide certain information to Merck by certain deadlines. Pre-Trial Order No. 28 ("PTO 28") requires all plaintiffs and tolling agreement claimants with claims pending as of November 9, 2007, to produce specified information regarding their claims if they are not eligible for or have not submitted their claims to the Vioxx Resolution Program. Under PTO 28, plaintiffs and tolling agreement claimants must provide case-specific expert reports to Merck by certain dates based on the first letter of the plaintiff's last name. Plaintiffs whose last names begin with the letters A through L were initially required to submit this information by May 1, 2008, and plaintiffs whose last names begin

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[1] For a more detailed factual background describing the events that took place before the inception of this Multidistrict Litigation, see *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565 (E.D. La. 2005) (resolving *Daubert* challenges to a number of expert witnesses). For a more detailed factual background describing the terms of the Vioxx Master Settlement Agreement and the events that took place after the parties reached a settlement, see *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2008 WL 3285912 (E.D. La. Aug. 7, 2008) (denying third-party payors' motions to enjoin interim payments).

with the letters L through Z were initially required to submit this information by July 1, 2008. Pre-Trial Order No. 29 imposes similar requirements on plaintiffs whose claims are filed or transferred to the MDL after November 9, 2007.

On December 10, 2007, certain plaintiffs (the "Benjamin Plaintiffs"), all of whom are represented by attorney Ronald Benjamin, appealed Pre-Trial Order No. 28 to the United States Court of Appeals for the Fifth Circuit. The Benjamin Plaintiffs sought to have the Fifth Circuit vacate the Court's requirement that plaintiffs' counsel produce case-specific expert reports. On March 28, 2008, the Fifth Circuit dismissed the Benjamin Plaintiffs' appeal without an opinion. *See In re Vioxx Prods. Liab. Litig.*, Case No. 07-31164 (5th Cir. March 28, 2008) (per curiam).

On April 17, 2008, certain other plaintiffs (the "Oldfather Plaintiffs") filed a motion to suspend or modify the requirements of Pre-Trial Order No. 28. The Oldfather Plaintiffs argued that PTO 28's requirements were premature as to those plaintiffs who alleged injuries for which the PSC had not yet developed general causation expert reports. With respect to plaintiffs who were eligible for the Vioxx Settlement Program, the Oldfather Plaintiffs argued that PTO 28 did not provide sufficient time to develop expert reports or seek new counsel. In essence, the Oldfather Plaintiffs contended that PTO 28 "is unfair and unilaterally slanted in favor of Merck, both in general and specific causation." *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008).

On May 30, 2008, the Court issued an Order & Reasons (the "May 30th Order") denying in part and

granting in part the Oldfather Plaintiffs' motion to vacate PTO 28. *Id.* In the Court's May 30th Order, the Court explained that PTO 28 "is a type of pre-trial order commonly known as a *Lone Pine* order," and that "[t]he United States Court of Appeals for the Fifth Circuit has recognized the value of and approved the use of *Lone Pine* orders in mass tort litigation." *Id.* (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (holding that it is within a district court's discretion to issue a *Lone Pine* scheduling order that essentially requires the production of "information that plaintiffs should have had before filing their claims")). In light of the advanced stage of the Vioxx litigation, the Court found that PTO 28 was appropriate and that, after nearly a decade of discovery, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether the injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady." *Id.*[2]

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[2] The Court explained that a *Lone Pine* order was particularly appropriate given the advanced stage of the Vioxx litigation, both in the federal MDL and the state courts:

> [I]n the present case, a *Lone Pine* order may not have been appropriate at an earlier stage before any discovery had taken place since little was known about the structure, nature and effect of Vioxx by anyone other than perhaps the manufacturer of the drug. But this case is no longer

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> in its embryonic stage. It has existed in state courts for over seven years and in this Court for over three years, and much discovery has taken place.... For nearly a decade, Plaintiffs' counsel throughout the country have been studying, exploring, and discovering all of the effects of Vioxx on the human body. In this MDL, the PSC did not selectively discovery only MI's or strokes, but rather they conducted general discovery on the effects Vioxx may or may not have on individuals. All of this material is and has been available to counsel in the individual cases.
>
> The Court finds that at this advanced stage of the litigation, it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether that injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady. Surely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief; after all this time it is reasonable to require Plaintiffs to come forward and show some kind of basic evidence of specific causation.

In re Vioxx Prods. Liab. Litig., 557 F. Supp. 2d at 744.

Accordingly, the Court denied the Oldfather Plaintiffs' request to vacate PTO 28. To ensure that all plaintiffs had a fair opportunity to comply with the requirements of PTO 28, however, the Court granted the Oldfather Plaintiffs' request to extend the deadlines for providing case-specific expert reports, allowing that claimants whose last names begin with the letters A though L should submit reports by July 1, 2008, whereas claimants whose last names begin with the letters M though Z should submit reports by August 1, 2008.

II. PRESENT MOTIONS

On June 30, 2008, the Benjamin Plaintiffs filed a motion seeking miscellaneous relief, including, *inter alia*: (1) the Court's resignation as Chief Administrator of the Vioxx Master Settlement Agreement; (2) an order vacating the Vioxx Master Settlement Agreement because it is in fact a class settlement subject to the requirements of Rule 23; (3) an amendment to PTO 28 to allow for alternate forms of proof or to extend the deadlines for submission of expert reports; (4) an order lifting the stay of discovery imposed by PTO 28; and (5) an order vacating Pre-Trial Order No. 37, which sets forth the terms of access to the PSC trial package. The Benjamin Plaintiffs have also filed a motion to stay any further orders of dismissal based on PTO 28 pending the Court's decision on their motion for miscellaneous relief. Both the Plaintiffs' Steering Committee and Merck have filed responses in opposition to the Benjamin Plaintiffs' motion. The Court will now address each of the Benjamin Plaintiffs' arguments in turn.

III. LAW & ANALYSIS

A. Motion for the Court's Resignation as Chief Administrator of the Vioxx Master Settlement Agreement

First, the Benjamin Plaintiffs seek the Court's resignation as Chief Administrator of the Vioxx Master Settlement Agreement. According to the Benjamin Plaintiffs, the Court should resign its role as Chief Administrator of the Settlement in part because the Court "is duty bound to exclude from compensation under the MSA the same injuries that are being pursued by plaintiffs in MDL 1657, and will have to rule on the viability of those injuries in the tort system." The Benjamin Plaintiffs offer no meaningful legal basis for their request. To the extent that the Benjamin Plaintiffs' motion might be interpreted as seeking judicial recusal pursuant to 28 U.S.C. § 455, however, the request is without merit.

Title 28, United States Code, Section 455 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. The Fifth Circuit has explained that recusal under § 455 is warranted only in those cases in which a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002). The facts of the instant case do not warrant recusal. As Chief Administrator of the Vioxx Master Settlement Agreement, the Court serves in an administrative capacity that has no substantive effect on its management of the MDL proceedings.

See In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2008 WL 4091672, at *2 (E.D. La. Aug. 27, 2008) (explaining that the Court "has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner"). The Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement. Accordingly, the motion for the Court's resignation is without merit.

B. Motion to Vacate the Master Settlement Agreement Pursuant to Rule 23

Second, the Benjamin Plaintiffs argue that the Vioxx Master Settlement Agreement should be vacated because the private, contractual agreement is in fact a class settlement subject to the requirements set forth in Rule 23. The Plaintiffs argue, among other things, that they were not adequately represented in the settlement discussions and that the settlement does not protect their individual interests.

The Benjamin Plaintiffs' reliance on Rule 23 is misplaced. This Court has previously denied class certification of personal injury Vioxx cases. *See In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 462-63 (E.D. La. 2006) (finding that the "number, uniqueness,

singularity, and complexity of the factual scenarios surrounding each case swamp any predominating issues"). Unlike a class settlement, the MSA is a private, opt-in settlement that was not secured through a settlement class vehicle and therefore poses no risk of binding any unwilling plaintiff to its terms. Despite the Benjamin Plaintiffs' rather unspectacular argument that plaintiffs' lead counsel may not bind the litigants in an MDL to a settlement agreement, the Benjamin Plaintiffs are unable to show how in fact they are "bound" by the terms of the private, opt-in settlement they seek to vacate. Lacking any support for their argument in legal precedent, the Benjamin Plaintiffs appear to base their request more on their own individual desire to rewrite the terms of the settlement. Accordingly, the motion to vacate is denied.

C. Motion to Modify Pre-Trial Order No. 28 to Allow for Alternate Forms of Proof or to Extend the Deadlines for Submission of Expert Reports

Third, the Benjamin Plaintiffs seek an order amending Pre-Trial Order No. 28 to allow for alternate forms of proof or to extend the deadlines for submission of expert reports. The Benjamin Plaintiffs propose two alternate forms of proof in lieu of case-specific expert reports: first, an attorney affirmation that the plaintiff has an expert who will opine that the plaintiff's injury was in fact causally related to Vioxx; or, second, a single affirmation opining a causal relationship between ingestion of Vioxx and the plaintiffs' non-eligible injuries. Alternatively, the Benjamin Plaintiffs seek an extension of the

deadlines for submission of case-specific expert reports for injuries not covered by the MSA. The Benjamin Plaintiffs allege that they were caught by surprise by PTO 28 because they were under the impression that it was the PSC's responsibility to pursue and prepare such information.[3]

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[3] Although the precise legal basis for the request is somewhat unclear, the Benjamin Plaintiffs do claim that their request is "injunctive, at least in part," and recite the four requirements for a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) threat of irreparable injury if the relief is not granted; (3) injury to the movant outweighs injury to the non-movant; and (4) granting relief will serve the public interest. *See Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). Nevertheless, it is clear that the Plaintiffs do not seek injunctive relief. To the extent that the request might be interpreted as a motion for injunctive relief, however, the Court finds that the Plaintiffs have made no showing as to any of the four elements necessary to succeed on such a request.

The request is similarly without merit to the extent that it might be interpreted as a motion for reconsideration. "A court's reconsideration of a prior order is an extraordinary remedy which should be used sparingly." *Motiva Enters. LLC v. Wegman*, No. 00-3096, 2001 WL 246414, at *2 (E.D. La. Mar. 12, 2001). Indeed, allowing the parties to seek reconsideration of the Court's orders simply because the parties might individually prefer a different

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For the reasons set forth in the Court's earlier opinion regarding PTO 28, the Plaintiffs' argument rings hollow. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 743. As the Court explained, *Lone Pine* orders such as PTO 28 are intended "to handle the complex issues and potential burdens on defendants and courts in mass tort litigation." *Acuna*, 200 F.3d at 340. By requiring plaintiffs to produce *case-specific* expert reports, PTO 28 enables the Court "to identify and cull potentially meritless claims and streamline litigation" in this complex MDL. *Baker v. Chevron USA, Inc.*, Civ. A. No. 05-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007). The Benjamin Plaintiffs' proposal to substitute alternate methods of proof would undermine the express purposes of the *Lone Pine* order. Similarly, the Plaintiffs' argument that PTO 28 imposes unduly burdensome requirements is simply not credible. As the Court has previously explained, "after all this time it is reasonable to require Plaintiffs to come forward and show the basis for their beliefs and show some kind of basic evidence of specific causation." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 744. Under scrutiny, the Benjamin Plaintiffs' motion for relief from PTO 28 amounts to

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result "would render the entire briefing process irrelevant and [would] lead to endless motions to reconsider." *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res.*, No. 03-1496, 2004 WL 1488665, at *1 (E.D. La. June 30, 2004). Accordingly, to the extent that the Benjamin Plaintiffs' request might be interpreted as a motion for reconsideration, it is denied.

little more than a thinly-veiled motion to vacate the order.[4] Accordingly, the motion is denied.[5]

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[4] In connection with their request to amend the terms of PTO 28, the Benjamin Plaintiffs also seek an order lifting the stay imposed by PTO 28, as well as an order vacating PTO 37, which sets forth the terms for access to the PSC's trial package. As the PSC makes clear in its response brief, however, the Benjamin Plaintiffs are free to "inspect and photocopy at their expense any non-work product document available in the depository consistent with this Court's other pretrial orders but without the obligation imposed by PTO No. 37." Accordingly, the request to vacate PTO 37 is dismissed as moot. Similarly, with respect to the Benjamin Plaintiffs' request to lift the stay imposed by PTO 28, the Plaintiffs' request is denied. The Court imposed the stay of discovery for good reason and will lift the stay at an appropriate time.

[5] Both the Plaintiffs' Steering Committee and Merck contend that Mr. Benjamin is merely employing the same failed discovery tactics that resulted in dismissal of his clients' cases in the *In re Diet Drug* litigation. *See In re Dieg Drugs*, 30 Fed. Appx. 27, 2002 WL 272351 at *1 (3d Cir. Feb. 26, 2002). In that litigation, the Third Circuit affirmed the district court's dismissal of Mr. Benjamin's cases after he repeatedly refused to comply with the district court's requirement that plaintiffs produce case-specific expert reports. In affirming dismissal of the plaintiffs' cases, the Third Circuit explained that

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the dismissal was warranted given Mr. Benjamin's litany of discovery abuses:

> Suffice it to say, appellants have been the victim of some bad lawyering by their trial counsel, Ronald R. Benjamin. Indeed, Benjamin's discovery abuses can be summarized as a parade of obstinance that ultimately cost his clients their day in court. The origin of Benjamin's discovery mischief dates back to October 18, 1999, when case-specific expert designations were due. Benjamin failed to honor this deadline. Instead, he objected to the need for disclosure before the District Court ruled on a related *Daubert* motion, citing the cost of obtaining expert reports.
>
> It is not necessary to burden this Opinion with a recounting of each and every subsequent instance of Benjamin's obstinance. In short, counsel had numerous opportunities to comply with the District Court's longstanding discovery order, yet stubbornly clung to his argument that he should not have to designate experts. Neither multiple express rejections of this already-rejected argument, nor threats of dismissal ameliorated counsel's defiance to the discovery schedule....

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IV. CONCLUSION

For the reasons stated above, the Benjamin Plaintiffs' Motion for Miscellaneous Relief (Rec. Doc. 14938) and Motion for a Stay (Rec. Doc. 16803) ARE DENIED.

New Orleans, Louisiana, this 10th day of December, 2008.

UNITED STATES DISTRICT JUDGE

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> On August 24, 2000, more than ten months after designations were due, the Special Discovery Master gave Benjamin yet another chance to do what he had, over many months, been ordered to do. Benjamin failed to seize this opportunity and the Special Master recommended dismissal as a sanction.

In re Diet Drugs, 30 Fed. Appx. 27, 2002 WL 272351 at *1 (3d Cir. Feb. 26, 2002).